IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.198 OF 2006
IN
ARBITRATION PETITION NO.423 OF 2004

Royal Education Society .. Appellants
V/s
LIS (India) Construction Co.Pvt.Ltd. .. Respondents

Mr.Saeed Akhtar for the Appellants.
Mrs.Lambay i/by M/s.Lambay & Co. for the Respondents.

CORAM: DR.S.RADHAKRISHNAN &
S.J.VAZIFDAR, JJ.

DATE : 19.04.2006.

P.C.:

1. This is an Appeal against the order of the learned Single Judge dismissing the Petition under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award.

2. The impugned order warrants no interference. We are in respectful agreement with the reasoning adopted by the learned Single Judge and would add thereto a few words of our own.

3. Mr.Akhtar, the learned Counsel appearing on behalf of the Appellants submitted that the learned Arbitrator ought to have dismissed the claim on the ground that the Respondent did not complete the work in time. He submitted that time was of the essence of the cotract. This is essentially a question of fact. It is not open for us to go into the entire record as we were invited to, for the purpose of determining whether in fact there was a delay in completion of the work. In construction

contracts, such as this, time is not presumed to be of the essence. Even if it is stated to be of the essence, it would cease to be of the essence if for instance the extention was agreed to or granted, or the terms and conditions of the contract indicated to the contrary. It is necessary in this regard only to refer to the authority of the Supreme Court (**M/s.Hind Construction Contractors V/s.State of Maharashtra - AIR 1979 SC 720).**

4. Mr.Akhtar, next submitted that the agreement was for a fixed sum of Rs.1,55,37,981.20. He submitted that no amount in excess of this sum, can, under any circumstances, be paid or be deemed to be payable. This submission is not well founded.

5. Clause 2 of the agreement dated 20th April, 2000 reads as under:-

> "The Owner will pay the Contractor the sum of Rupees 1,55,37,981.20 only - One Crore Fifty Five Lacs Thirty Seven Thousand Nine Hundred Eighty One Rupees and Twenty Paise only- (hereinafter referred to as "the Contract Sum") or such other sum as shall become payable hereunder at the times and in the manner specified in the said Conditions".

It is clear therefore that there was no ceiling or cap to the amount that may ultimately be payable by the Appellants to the Respondents. The mere fact that in a letter dated 20th April, 2000 the Architect had stated that the total cost of the project will be within 1.55

crores cannot alter the contractual stipulation. Moreover it, in any event, would not be conclusive of the matter. Mr.Akhtar, submitted that this letter ought to be read into the contract. Even then, it would be a question of construction and evidence as to whether clause 2 of the Contract was subject to the said letter.

6. Lastly, it was submitted by Mr.Akhtar that a substantial part of the claim was in respect of the basement constructed by the Respondents. He submitted that the basement was not a part of the original drawings. He therefore submitted that the learned Arbitrator has exceeded his jurisdiction.

7. We are unable to agree with this contention either. There is no dispute that the basement was constructed. It is not the Appellants' case that they were unaware that the basement was being constructed. They were aware of the same throughout. As rightly pointed out by the Respondents, it was for the Appellants to establish that the basement did not form a part of the contract. Even before us the Plans were not produced. Even if they were produced, they would not have carried the Appellant's case further.

8. Admittedly, Runing Bill No.17 refers to the basement. Admittedly, the Appellants were aware of the same. More important, it must be noted that the basement was constructed pursuant to and strictly in

accordance with the instructions and plans/drawings furnished by the Architect. The Respondents were bound to carry out the work as per the Architect's instructions. In this regard, it is pertinent to note the following clauses in the agreement:-

"GENERAL INFORMATION

For quantity and positions of R.C.C. members refer to Structual drawings only. The work will carried out according to the working drawing. These are preliminary drawing, all working drawings and detail drawing shall be supplied to the contractor during course of construction.

The quantity shown are Approximate, all payments shall be made on actual measurements and quantities."

9. In this view of the matter it is not necessary for us to consider whether the amount, in any event would be payable under clause 31 of the agreement, which pertains to extra work and reads as under:-

"EXTRA ITEMS:-

Rates for additional or extra items of construction shall be calculated on the basis of actual cost plus 10% (ten percent) extra."

10. In the circumstances, Appeal stands dismissed.

(DR.S.RADHAKRISHNAN, J.)

(S.J.VAZIFDAR, J.)